United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

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75-7600

United States Court of Appeals

FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND UPON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF OF AMERICAN BROADCASTING COMPANIES, INC., *AMICUS CURIAE*

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BRIEF OF AMERICAN BROADCASTING COMPANIES, INC., *AMICUS CURIAE*

American Broadcasting Companies, Inc. ("ABC") submits this brief, *amicus curiae,* to urge that this Court reverse the decision of the district court and hold that ASCAP and BMI have unlawfully restrained price competition in the licensing of music for performance on network television. All the parties have consented to the filing of this brief.

Interest of the *Amicus Curiae*

ABC owns and operates a nationwide television network. ABC licenses most of its television programming from independent production companies; the remainder it produces itself. Historically, ABC has obtained the music

performance rights necessary to exhibit all of that programming from ASCAP and BMI, which have issued only all-or-nothing blanket licenses, substantially identical to those obtained by CBS and described in the prior decisions in this case. The blanket licenses from ASCAP and BMI have covered every musical composition in the ASCAP and BMI repertories; the corresponding license fees charged by ASCAP and BMI for music used under the blanket licenses have borne no relationship to the actual use made of ASCAP and BMI music under the blanket licenses.* Under this system, price competition in the licensing of performance rights for music used on ABC has been eliminated.

As a licensee of music performance rights, ABC, while it has no interest in seeking damages from ASCAP and BMI for their antitrust violations, does have a direct and substantial interest in any decision in this case that would remove the restraints that ASCAP and BMI place on price competition in the licensing of music performance rights for network television. Conversely, ABC's interests would be impaired were the judgment of the district court affirmed by this Court.

Argument

The liability issue in this case, under the rule of reason, comes down to the question of whether the all-or-nothing blanket licensing policy restrains competition more than reasonably necessary—which means, in essence, whether significantly less restrictive alternatives are available.

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* The amount of those fees has been substantial. For example, in 1977 ABC paid ASCAP and BMI blanket license fees amounting to approximately $5,800,000.

The Supreme Court majority preferred this Court "first to address the matter," but Mr. Justice Stevens did so, *inter alia,* in the following terms:

> "The current state of the market cannot be explained on the ground that it could not operate competitively, or that issuance of more limited—and thus less restrictive—licenses by ASCAP is not feasible. The District Court's findings disclose no reason why music performing rights could not be negotiated on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP. In fact, ASCAP now compensates composers and publishers on precisely those bases.
>
> * * *
>
> "Since the record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single, blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.,* —— U.S. ——, 99 S Ct. 1551, 1569-70 (1979) (footnote omitted).

That analysis, with which nothing in the majority opinion conflicts, is plainly correct.

The reason that music performance rights are licensed on a blanket basis is attributable to the restrictive licensing practices of ASCAP and BMI. The present system of blanket licensing does not exist because the licensees prefer it. The fact is that ABC considers the present take-it-or-leave-it blanket licensing system objectionable and undesirable.

ASCAP and BMI perpetuate the present blanket licensing system by refusing to license on anything other than

an all-or-nothing, blanket-only basis,* thereby maximizing the significant risks of loss and disadvantage that ABC, or any network, would face if it unilaterally tried to bypass ASCAP or BMI. (*See generally* 99 S. Ct. at 1570-71 (opinion of Mr. Justice Stevens).) Those risks of loss and competitive disadvantage arise, *inter alia,* (1) from the fact that the blanket license dulls ASCAP and BMI members' incentive to compete (see 562 F.2d at 139, 140) and therefore makes the prospect of successful direct licensing less likely (if not entirely remote), as well as more costly, and (2) from the problem of acquiring licenses for music that is "in-the-can" in programs under license to television networks (*see* 99 S. Ct. at 1571 n.31 (opinion of Mr. Justice Stevens)).**

Were this Court to hold that through the present blanket licensing system ASCAP and BMI unlawfully restrain price

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* As this Court previously found, "[t]he per program license is simply another form of blanket license." (562 F.2d at 133).

** In its prior opinion in this case, this Court noted that it was "hard to see how 'music in the can' problems will be solved by an injunction against blanket licensing", since "individual licenses would still have to be negotiated with some of the same economic problems involved." (562 F.2d at 135 n.14.) There are, however, several possible answers to that implicit inquiry. First of all, the relief in this case could provide for a per use licensing system applicable to music in the can. Under such a system, the district court would use license fees established in direct negotiations for music not in the can as a reference point in seeing that music publishing companies and writers did not succeed in exacting premiums for issuing individual licenses for music already in the can and in a network's inventory. Another possible answer to the music-in-the-can problem, of course, would be the "forfeiture" alternative adopted in *Alden-Rochelle* v. *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions). This matter can be considered fully by the district court on remand. The important point here, however, is that the music-in-the-can problem relates to a particular set of programs already in existence. That problem should not be allowed to affect music licensing for all other television programming, as it presently does under the blanket licensing practices of ASCAP and BMI.

competition, less restrictive alternatives which are presently either not practicable or available could be used and developed, and, at the very least, the options presently lacking would finally exist. For example, anything that ABC now obtains through a blanket license could be obtained at least as efficiently and cheaply in a competitive, direct-licensing market, such as the one that already exists for movie performance rights for music (*see* pp. 8-9, *infra*) and would become practicable for networks if the present blanket licensing system were held unlawful.

Similarly, per use licensing would be far less restrictive than the present blanket licensing system. In the first place, it would immediately permit price competition among ASCAP and BMI members, *inter se,* to begin to occur in this market. (*See* 562 F.2d at 140-41). Moreover, it would significantly reduce the costs, risks and disincentives presently associated with any attempt by ABC (or any network) to bypass ASCAP and BMI and deal directly with copyright holders, since both ABC and the copyright holders would have the opportunity and the inclination to explore, negotiate and enter into direct agreements without necessarily resorting to ASCAP or BMI as an intermediary.* This practice of direct negotiations (which does not presently exist) could develop side-by-side with per use licensing, and its development would be sequential, as one copyright holder is followed by another in engaging in the practice. In sum, per use licensing would be less restric-

* Under the present system, a network has no incentive to deal directly with a copyright holder since the network already has the right to use the copyright holder's music under the blanket license and an agreement between the network and the copyright holder would require the network to pay twice for the same rights. Under a per use system, on the other hand, this situation would, of course, no longer persist.

tive than the present take-it-or-leave-it blanket licensing system because it would foster competition among copyright holders themselves and would make it practicable for those copyright holders and the networks to deal directly with each other. Most significantly, as a result price competition would no longer be restrained.

There can be no plausible explanation for ASCAP's and BMI's refusal to issue licenses that are less restrictive, other than a desire to eliminate price competition. Hence, Mr. Justice Stevens, the only Supreme Court Justice to address the merits under the rule of reason standard, concluded that, on this record, blanket-only licensing "clearly" has "a significant adverse impact on competition." (99 S. Ct. at 1566).

The Supreme Court majority opinion in this case, while not deciding the rule of reason issue, provides guidelines for assessing the lawfulness of ASCAP's blanket licensing practices under the rule of reason. The majority opinion indicates that the principal consideration in assessing the lawfulness of blanket licensing is whether there is a market necessity for blanket licensing or, alternatively, whether individual, direct-licensing transactions are practicable.

The majority opinion points out that there are many situations where the marketplace in music rights functions very well without blanket licensing and, indeed, without any involvement by ASCAP at all:

> "Significantly, ASCAP deals only with nondramatic performance rights. Because of their nature, dramatic rights, such as for musicals, can be negotiated individually and well in advance of the time of performance. The same is true of various other rights, such as sheet music, recording, and synchronization, which

are licensed on an individual basis." (99 S. Ct. at 1563 n.37.).*

The Supreme Court majority noted, on the other hand, that there are situations where ASCAP, through blanket licensing, has "made a market in which individual composers are inherently unable to fully effectively compete." (*Id.* at 1564.) Examples of such situations may include music licensing to individual radio stations, night clubs and restaurants:

> "... ASCAP and the blanket license developed together out of the practical situation in the market place: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, night clubs and restaurants, 562 F.2d at 136-37, n.26, and it was in that milieu that the blanket license arose." (*Id.* at 1562-63.)

In such contexts, the blanket license, according to the Supreme Court majority, can be a "different product", responding to market needs that cannot practically be met

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* Similarly, the majority noted that "of course", even in a market where blanket licensing was once permissible, "changes brought about by new technology or new marketing techniques might also undercut the justification for the practice." (*Id.* at 1563 n.34.)

by individual licensing. For example, for radio stations, night clubs and restaurants, the blanket license provides a solution to the problem of

> "[t]he disk-jockey's itchy fingers and the bandleader's restive baton [which], it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author." (*Id.* at 1563 n.37.)

Music performance rights for network television are comparable to synchronization rights and other music rights. Composers and publishers presently license synchronization rights for music used in network television programs directly to program packagers, in individual transactions. As this Court has previously recognized (*see* 562 F.2d at 135), there is no reason at all why the packagers could not also obtain the necessary network performance rights at the same time. In such a situation, the person selecting the music to be used (the program producer) could choose among various copyrighted compositions in a fully competitive market, taking into account the price of both synchronization rights and network performance rights. Packagers, in turn, would furnish the necessary music performance rights to networks as part of their overall program license agreements.

Of course, that does not happen under the present blanket licensing system of ASCAP and BMI. Instead, the copyright holder licenses the synchronization right but *not* the network performance right directly to the packager. The copyright holder splits off the music performance right and authorizes ASCAP and BMI to license it (as part of blanket licenses) to television networks. Accord-

ingly, price competition with regard to the cost of network performance rights does not take place.

Precisely that pattern used to prevail in the motion picture industry, until it was struck down by the courts and prohibited in government consent decrees with ASCAP and BMI.* Today, with respect to music in movies, composers and publishers license both synchronization rights and theatrical performance rights directly and simultaneously to movie producers, and price competition among composers and publishers accordingly covers both synchronization rights and theatrical performance rights. Producers, in turn, provide theaters with all of the rights necessary to exhibit their movies, including music performance rights. The pattern that exists today in the licensing of music rights for movies and in the licensing of synchronization rights for network television programming could and should prevail in the licensing of music performance rights for television networks.**

We submit that there are no procompetitive consequences to the present blanket licensing practices of ASCAP and BMI, much less any that can justify (or outweigh) the

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* *See Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900 (S.D.N.Y. 1948) (two opinions); *W. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub. nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

** Although movie theaters obtain the necessary music performance rights directly from producers as part of movie licensing agreements, television networks obtain the necessary music rights to exhibit the very same movies from ASCAP and BMI, rather than from the producer. There is absolutely no reason for this difference, except the continuing restraint imposed by ASCAP and BMI blanket licensing practices on the licensing of music performance rights for network television. For a network today to obtain the performance rights directly from a movie producer (while retaining its blanket license) would simply involve paying twice for rights the network already has.

anticompetitive effects of the present take-it-or-leave-it blanket licensing system.

Conclusion

ABC respectfully submits that the judgment of the district court should be reversed, and that this Court should hold that ASCAP and BMI have unlawfully restrained price competition in the licensing of music performance rights for network television.

Dated: New York, New York
September 27, 1979

Respectfully submitted,

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September 27, 1979

Columbia Broadcasting System, Inc.
v. ASCAP, Dkt. No. 75-7600

Dear Mr. Pastor:

CBS hereby consents to ABC's request for permission to file a brief as amicus curiae in the above action.

Sincerely,

Roger H. Cummings

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September 26, 1979

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CBS v. ASCAP and BMI

Dear Mr. Pastor:

This is to confirm that ASCAP has consented to your filing a brief amicus curiae on behalf of ABC in the above-referenced matter in the United States Court of Appeals for the Second Circuit.

Sincerely yours,

Allan Blumstein

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September 26, 1979

DELIVER

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Re: CBS v. ASCAP, et al., and BMI, et al.,
Docket No. 75-7600 (Second Circuit)

Dear Mr. Pastor:

I am writing in response to your telephone request that our client, Broadcast Music, Inc. ("BMI") consent to the filing of an amicus brief by American Broadcasting Company ("ABC") in connection with the above-referenced appeal.

Since BMI believes CBS' appeal involves only the narrow issue of music licensing as it relates to television networks and since ABC is a television network, BMI consents to the filing of an amicus brief by ABC. As we discussed, BMI's consent is conditioned on the fact that ABC's amicus brief will be filed and served on Thursday, September 27, 1979, the date when CBS' appellate brief is due.

Very truly yours,

Norman C. Kleinberg

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